No. 88-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION, THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, THE POINT OF PURCHASE ADVERTISING INSTITUTE, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.3 of the rules of this court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the respondent's policy of blanket refusal to provide consent to all *amici curiae*.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting commercial free speech rights. WLF has

appeared as *amicus curiae* in a number of cases dealing with commercial free speech issues such as *Pacific Gas and Electric v. Public Utility Commission of California*, 475 U.S. 1 (1986) and *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980). In addition, WLF has appeared before Congressional subcommittees and regulatory agencies which have sought to restrict the rights of businesses. On July 25, 1989 WLF testified before the House Energy and Commerce Subcommittee on Transportation and Hazardous Materials on the issue of the constitutionality of certain proposed restrictions on advertising, promotion, and other commercial practices concerning tobacco products. WLF has worked with coalitions interested in the issue of commercial free speech. Finally, the Legal Studies Division of WLF has published several works on advertising bans and restrictions, including articles by former Federal Communications Commission Chairman Richard Wiley and American Civil Liberties Union Legislative Counsel Barry Lynn.

The Outdoor Advertising Association of America (OAAA) is a national trade association comprised of approximately 200 outdoor advertising companies operating in 46 states and representing the majority of the billings of outdoor advertisers. Founded in 1891, the OAAA appears before committees of Congress and state legislatures on issues affecting commercial free speech.

The Point of Purchase Advertising Institute (POPAI) is a national advertising trade association based in Englewood, New Jersey. POPAI has an active and large membership of entities involved in point of purchase advertising and in issues affecting commercial free speech.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions. AEF believes that the public interest is best served by full and robust debate on commercial issues, and that laws prohibiting such speech are wholly at odds with the guarantee of freedom of speech provided by the First Amendment.

For the foregoing reasons, *amici curiae* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*. *Amici* are in a unique position to aid the Court in its consideration of the issues presented. The interests of *amici* are direct and substantial. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear. Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of petitioner be granted.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

The interests of the *amici curiae* are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT OF THE CASE

The relevant facts are simple and undisputed. Petitioner Gary E. Peel is an attorney licensed to practice law in the State of Illinois. In 1983, Mr. Peel began placing on his attorney letterhead the factual statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy ("NBTA").[1] Mr. Peel in the normal course of business distributed the letterhead to fellow attorneys, opposing litigants, and existing clients. Mr. Peel contends that he did not use the letterhead, or the statement that he was a certified specialist, as part of any direct effort to solicit new clients, and Respondent has introduced no evidence to the contrary.

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[1] Founded in 1976, NBTA is an organization dedicated to improving the quality of the trial bar and enhancing the delivery of legal services to the public by providing a reliable national credentialling process for specialists in trial advocacy. NBTA certifies only those who meet its exacting objective standards of experience, ability, and concentration in trial advocacy. The organization is sponsored by the American Trial Lawyers Association, the International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys, and the National District Attorneys' Association. And it is overseen by a distinguished board of judges, practitioners, and academics. At no stage of this proceeding has Respondent introduced any evidence challenging the *bona fides* of NBTA or its certification process.

In 1986, during the course of Mr. Peel's representation of other attorneys in proceedings before Respondent Attorney Registration and Disciplinary Commission of Illinois ("ARDC"), the Administrator of the ARDC became aware that Mr. Peel's letterhead included the statement regarding NBTA certification. The Administrator thereafter initiated a complaint against Mr. Peel, alleging, *inter alia*, that the letterhead statement violated Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, which states that except in very limited circumstances (not applicable to Mr. Peel) "no lawyer may hold himself out as 'certified' or a 'specialist.'"

At a hearing before the ARDC Hearing Board, the Administrator introduced no evidence that the letterhead statement was misleading or that anyone had been misled by the statement. Nor did the Administrator introduce any evidence that Mr. Peel had ever used his letterhead to solicit business from potential clients. Nonetheless, the Hearing Board found that the letterhead statement violated Rule 2-105(a)(3), a finding that was upheld by the ARDC Review Board and the Illinois Supreme Court. *See In re Peel*, 126 Ill.2d 397, 534 N.E.2d 980 (1989). The Illinois Supreme Court adopted the Review Board's recommendation that Mr. Peel be censured for his conduct. 534 N.E.2d at 986.

At all stages of this proceeding, Mr. Peel has challenged the constitutionality of Rule 2-105(a)(3) and its application to him. Mr. Peel contended, *inter alia*, that the disciplinary rule violated his freedom of speech under the First and Fourteenth Amendments. The Illinois Supreme Court considered and rejected that contention, asserting that Mr. Peel's letterhead statement was misleading and therefore not entitled to First and Fourteenth Amendment protection. 534 N.E.2d at 984.

SUMMARY OF THE ARGUMENT

The Illinois Supreme Court violated Mr. Peel's rights to free speech guaranteed by the First and Fourteenth Amendments when it censured him. That court's action was unconstitutional regardless of whether Mr. Peel's speech is properly classified as commercial speech or, as *amici* contend, as noncommercial speech.

This Court has defined commercial speech as speech that proposes a commercial transaction. The statement contained in Mr. Peel's letterhead is properly classified as noncommercial speech because it does not propose such a transaction; indeed, Mr. Peel never sent the letterhead to potential clients. The fact that Mr. Peel distributed his letterhead in the course of conducting his business affairs does not transform what would otherwise be noncommercial speech into commercial speech. The Court should not expand the current definition of commercial speech to include Mr. Peel's letterhead statement; to do so would lead to confusion as to the distinction between commercial speech and, consequently, a chilling of First Amendment rights. Because Mr. Peel's letterhead statement is noncommercial speech, Illinois may not regulate the statement in the absence of a compelling interest for doing so, and Illinois has failed to articulate such an interest.

Even if Mr. Peel's letterhead statement is properly classified as commercial speech, Illinois acted unconstitutionally in censuring Mr. Peel for that statement. A State may regulate commercial speech that is neither misleading nor related to an unlawful activity only upon a showing that: (1) the State has a substantial interest that it seeks to achieve; (2) the regulation directly advances the asserted interest; and

(3) the regulation is no more extensive than necessary to serve that interest. The ARDC has failed to make any of the required showings. It introduced no evidence to show that Mr. Peel's letterhead is actually misleading. The ARDC has failed to articulate a substantial State interest in regulating the content of attorney letterhead not sent to potential clients. Moreover, the ARDC's prohibition on disclosing NBTA certification does not directly advance its interest in seeing that consumers choose attorneys wisely, because the result of the prohibition is to prevent consumers from obtaining any information regarding the quality of attorneys whom they are considering retaining. Finally, the ARDC's prohibition on disclosing NBTA certification is far more extensive than is necessary to serve the ARDC's interest, because experience in other States demonstrates the workability of a system that regulates attorneys' claims as to the quality of their services without banning such claims altogether.

ARGUMENT

I. PETITIONER'S LETTERHEAD STATEMENT REGARDING NBTA CERTIFICATION IS NONCOMMERCIAL SPEECH, AND THUS ARDC'S ATTEMPTS TO REGULATE THAT STATEMENT CANNOT SURVIVE EXACTING FIRST AND FOURTEENTH AMENDMENT SCRUTINY.

While recognizing that commercial speech, like other varieties of speech, is protected by the First and Fourteenth Amendments, this Court has granted the States greater leeway in regulating commercial speech than in regulating noncommercial speech. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). In rejecting

Petitioner's contention that his letterhead statement regarding NBTA certification was constitutionally protected, the Illinois Supreme Court clearly assumed that the statement constituted commercial speech and thus was entitled to a lower level of protection than that normally afforded to noncommercial speech. 534 N.E.2d at 984.

The Illinois Supreme Court erred in classifying Petitioner's letterhead statement as commercial speech. This Court's precedents establish that the statement should be classified as noncommercial speech. The ARDC's attempts to prohibit the statement violate the severe restrictions imposed by the First and Fourteenth Amendments on the States' authority to regulate noncommercial speech.[2]

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[2] In its opposition to Mr. Peel's petition for certiorari, the ARDC contended that Mr. Peel waived his right to assert that his letterhead statement should be classified as noncommercial speech for purposes of First Amendment analysis because, the ARDC contended, Mr. Peel failed to make that assertion before the Illinois Supreme Court. *See* Brief in Opposition to Petition for Certiorari at 12. The ARDC's contention is without merit. It is uncontested that at all stages of this proceeding Mr. Peel has asserted that the ARDC's attempts to discipline him violated his free speech rights under the First and Fourteenth Amendments. For purposes of determining whether Mr. Peel has waived the right to assert particular arguments in support of his free speech claim, it is irrelevant whether those arguments were raised below so long as the free speech claim was itself presented. "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899). *See Bankers Life and Casualty Co. v. Crenshaw*,

A. Petitioner's Letterhead Is Not Commercial Speech Because It Does Not Propose a Commercial Transaction.

This Court on several occasions has been called upon to differentiate between commercial and noncommercial speech. While declining to establish precise contours for commercial speech, the Court has defined "commercial speech" as speech that "propose[s] a commercial transaction." *Board of Trustees of State University of New York v. Fox*, 109 S.Ct. 3028, 3031 (1989); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562 (1980); *Virginia State Board of Pharmacy*, 425 U.S. at 762.

Under that definition, Mr. Peel's inclusion on his attorney letterhead of the truthful statement that he is certified as a civil trial specialist by NBTA qualifies as noncommercial speech. The letterhead statement does not propose a commercial transaction with anyone. While such a statement contained in an advertisement could well be construed as commercial speech, there was no evidence below that Petitioner's letterhead had ever been mailed to any layperson who was not already a client, or that Petitioner had ever used that letterhead, or the statement regarding NBTA certification, in the yellow pages, or in any advertisement, brochures, or other types of printed materials. Indeed, Petitioner testified before the ARDC Hearing Board that he had not done so. Since Petitioner never sent his letterhead

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108 S.Ct. 1645, 1655 (1988)(O'CONNOR, J., concurring in part and concurring in judgment); *Illinois v. Gates*, 462 U.S. 218, 219-20, 248 (1983)(WHITE, J., concurring in judgment).

to potential clients (the sole group with which he would be interested in entering into a commercial transaction), it follows that the letterhead does not propose a commercial transaction.

It is true that Mr. Peel distributed his letter solely in connection with the conduct of his business affairs; but such a connection does not transform noncommercial speech into commercial speech. The Court repeatedly has stated that speech does not lose its full First Amendment protection simply because it is uttered for a profit. *See Board of Trustees of State University of New York*, 109 S.Ct. at 3036 (providing tutoring services, legal advice, and medical consultation for a fee do not constitute commercial speech because they do not propose a commercial transaction, even though they consist of speech for a profit); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983) ("the fact that Youngs has an economic motivation for mailing the pamphlets [discussing use of contraceptives] would clearly be insufficient by itself to turn the material into commercial speech"); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (advertisement in newspaper soliciting funds for civil rights organization held entitled to full First Amendment protections).

Indeed, if all speech uttered in connection with a commercial business activity were classified as commercial speech, then no profit-seeking corporation could ever engage in noncommercial speech, since by definition all speech engaged in by a profit-seeking corporation is connected with its business activities. Yet the Court has made clear that corporations are entitled to engage in noncommercial speech that enjoys the highest level of First Amendment protection. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

Nor is speech transformed into commercial speech simply because it is theoretically possible that a potential client might see Mr. Peel's letterhead and be persuaded thereby to engage Mr. Peel's services. The test is whether the speaker *proposes* a commercial transaction. *Virginia State Board of Pharmacy*, 425 U.S. at 762. In the absence of any evidence that Mr. Peel included NBTA certification information in his letterhead for the purpose of proposing or encouraging commercial transactions -- or evidence that Mr. Peel even contemplated that commercial transactions would result from inclusion of the information -- the letterhead cannot be classified as commercial speech. The State of Illinois has no more right to dictate to Mr. Peel the content of letterhead not sent to prospective clients than it has to direct the Chicago Tribune not to include the words "World's Greatest Newspaper" on the masthead of newspapers sent to its subscribers; neither case involves commercial speech because in neither case is a commercial transaction proposed.

B. Expanding the Definition of Commercial Speech to Cover Petitioner Would Lead to Confusion and Chilling of First Amendment Rights.

In differentiating between commercial and noncommercial speech, the Court has emphasized the "commonsense differences between speech that does no more than propose a commercial transaction ... and other varieties." *Virginia State Board of Pharmacy*, 425 U.S. at 771 n.24. The line drawn by the Court between these two types of speech is thus a relatively bright line that allows speakers to know with some degree of certainty which side of the line they fall on. As demonstrated above, Mr. Peel's letterhead clearly falls on the noncommercial side of the line as now drawn.

The ARDC apparently seeks a redrawing of that line such that any statement made by an attorney regarding his qualifications to practice law -- whether or not made for the purpose of proposing a commercial transaction -- would be classified as commercial speech. *See* Brief in Opposition to Petition for Writ of Certiorari at 14. Any such redrawing, by blurring the current bright-line distinction between commercial and noncommercial speech, would create significant confusion as to that distinction and would lead to a chilling of First Amendment rights.

The Court has consistently recognized that freedom of expression needs "breathing space" in order to survive. *New York Times Co. v. Sullivan*, 376 U.S. at 272. In order to "insure that the flow of truthful and legitimate .... information is unimpaired" (*Virginia State Board of Pharmacy*, 425 U.S. at 771 n.24), the Court has gone to great lengths to ensure that those wishing to engage in protected noncommercial speech not be deterred from doing so out of fear of punishment for their speech. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (litigants whose noncommercial speech may properly be regulated have standing to challenge a substantially overbroad statute on First Amendment grounds, in order to prevent chilling effect statute may have on others whose speech is fully protected under First Amendment). Yet, redrawing the line between commercial and noncommercial speech as proposed by the ARDC would lead to just such a chilling of protected noncommercial speech. The current formulation for distinguishing between commercial and noncommercial speech (whether the speech "proposes a commercial transaction") is readily understandable by the average citizen: a businessman knows that so long as his speech does not propose a commercial trans-

action[3] and is not indecent, obscene, or libelous, his speech is protected by the almost-unlimited protections of the First Amendment. If the definition of commercial speech is expanded to include statements by a lawyer that do not propose a commercial transaction but that bear on his qualifications to practice law, the bright-line distinction between commercial and noncommercial speech will be lost. We can conceive of no other line that would permit a businessman readily to distinguish between commercial and noncommercial speech. The inevitable result would be the chilling of valuable and fully protected noncommercial speech by those who feared that their speech might be classified as commercial speech.

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[3] This is not to suggest that under the current formulation speech may not be classified as commercial speech in the absence of an explicit proposal for a commercial transaction. Obviously, a newspaper advertisement listing an attorney's name, address, and phone number and noting his NBTA certification would constitute commercial speech, notwithstanding the absence from the advertisement of any explicit proposal such as "Please call for an appointment." *See Virginia State Board of Pharmacy*, 425 U.S. at 764-65 (pharmacist cannot transform advertisement into noncommercial speech by casting himself as "a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof"). The key distinction between commercial and noncommercial speech is the intent of the speaker: speech is commercial if it is uttered with the intent of bringing about a commercial transaction, regardless of the precise language used.

Expanding the definition of commercial speech to include all statements by an attorney regarding his qualifications to practice law quite clearly would encompass much speech uttered without thought of proposing a commercial transaction. In many cases, such statements are made in order to lend credence to other statements made by the attorney. An attorney speaking before a bar association group or writing an article in a legal publication may believe that his audience will justifiably pay closer heed to what he has to say if he prefaces his remarks with a listing of work experience that makes him qualified to speak. Similarly, an attorney writing to fellow attorneys and existing clients might believe that the statements contained in the letter would justifiably have more persuasive force if accompanied (in the letterhead) by a statement of the attorney's qualifications. Such statements regarding qualifications convey valuable information, and in the absence of evidence that such statements are conveyed for the purpose of proposing a commercial transaction, they should not be subject to the broad regulation that the States may impose upon commercial speech.

Moreover, the justifications advanced by the Court for permitting greater regulation of commercial speech than of noncommercial speech argue against an expansion of the definition of commercial speech to include all statements by an attorney regarding his qualifications to practice law. Commercial speech is thought to be "more durable" than noncommercial speech and less likely to be chilled because businessmen whose livelihood depends on attracting customers through advertising are thought unlikely to be deterred

by State regulation of such advertising.[4] Statements by attorneys regarding their qualifications to practice law made not in the context of proposing a commercial transaction are much less likely to endure extensive State regulation than is speech normally classified as commercial speech. Since by definition speech in the former category has a lesser impact on an attorney's financial well-being than speech in the latter category, an attorney is much more likely to forego speech in the former category in the face of extensive State regulation. It is precisely that type of chilling effect that the First Amendment was designed to prevent. *Virginia State Board of Pharmacy*, 425 U.S. at 770.

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[4] The Court has advanced two justifications for affording less First Amendment protections for commercial speech:

> The truth of commercial speech .... may be more easily verified by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, *commercial speech may be more durable than other kinds*. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. [¶] Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.

Virginia State Board of Pharmacy, 425 U.S. at 771 n.24 (emphasis added).

In conclusion, the Court should not expand the definition of commercial speech to include speech that does not propose a commercial transaction. Since the statement on Mr. Peel's letterhead does not propose a commercial transaction, it is not commercial speech.

C. Petitioner's Letterhead Statement May Not Be Prohibited in the Absence of a Compelling State Interest in Doing So.

The Court has made clear that a State may not prohibit noncommercial speech of the type at issue here in the absence of a compelling interest for doing so. *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. at 786. Moreover, the burden is upon the State to demonstrate its compelling interest. *Id.*

The State of Illinois has not introduced any evidence of a compelling interest in suppressing Mr. Peel's speech, nor has it even contended that such a compelling interest exists. Accordingly, its censure of Mr. Peel cannot survive First Amendment scrutiny.

Alternatively, even if the ARDC could constitutionally regulate Mr. Peel's speech, Rule 2-105(a)(3) must be voided as substantially overbroad. *See Board of Trustees of State University of New York*, 109 S.Ct. at 3035-38. Rule 2-105(a)(3) categorically prohibits lawyers from holding themselves out as "certified" or as a "specialist." Whether or not the ARDC has a compelling interest in preventing Mr. Peel from listing his NBTA certification on his letterhead, it surely cannot claim such an interest in preventing all statements by lawyers regarding their special areas of expertise. For example, the ARDC could have

absolutely no basis for preventing an attorney, upon request of a prospective employer, from telling the employer the areas of law in which he has developed an expertise or to tell the employer that he has been certified by NBTA. Yet, the overbroad sweep of Rule 2-105(a)(3) would prohibit such speech. Accordingly, Rule 2-105(a)(3) must be struck down as an overbroad infringement of protected First Amendment rights. *Id.*; *Broadrick v. Oklahoma*, 413 U.S. at 613.

II. EVEN IF PETITIONER'S LETTERHEAD STATEMENT REGARDING NBTA CERTIFICATION IS COMMERCIAL SPEECH, RESPONDENT EXCEEDED CONSTITUTIONAL BOUNDS IN DISCIPLINING PETITIONER IN THIS CASE.

The Court has repeatedly held that commercial speech, like other varieties, is entitled to First Amendment protection. *Virginia State Board of Pharmacy*, 425 U.S. at 770. A State may regulate commercial speech that is neither misleading nor related to an unlawful activity only upon a showing that: (1) the State has a "substantial" interest that it seeks to achieve; (2) the regulation directly advances the asserted interest; and (3) the regulation is no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 447 U.S. 557, 566 (1980). The ARDC cannot meet the requirements set forth by *Central Hudson* for regulating commercial speech; accordingly, even if Mr. Peel's letterhead statement regarding NBTA certification is considered commercial speech, the ARDC's attempt to censure Mr. Peel for disseminating that speech violates Mr. Peel's rights under the First and Fourteenth Amendments.

A. Petitioner's Letterhead Was Neither Misleading nor Related to an Unlawful Activity.

The Court has recognized the right of States to prohibit entirely misleading commercial speech, *In the Matter of R.M.J.*, 455 U.S. 191, 203 (1981); as well as commercial speech related to an unlawful activity. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 326, 345 (1986). However, the ARDC makes no claim that Mr. Peel's letterhead was related to an unlawful activity, and it introduced no evidence that the letterhead was misleading or that anyone had been misled thereby. The Illinois Supreme Court acknowledged the absence of such evidence. 534 N.E.2d at 984.

That would be the end of the matter, except that the Illinois Supreme Court actually made a finding that the letterhead was "misleading." The Illinois Supreme Court listed two bases for that finding: (1) because the letterhead statement regarding NBTA certification was juxtaposed with a truthful statement that Mr. Peel was licensed to practice law in Illinois, Missouri, and Arizona, the general public "*could* be misled to believe that [Mr. Peel] may practice in the field of trial advocacy solely because he is certified by the NBTA"; and (2) the letterhead statement regarding NBTA certification is misleading "because it tacitly attests to the qualifications of [Mr. Peel] as a civil trial advocate." 534 N.E.2d at 984 (emphasis added).

Neither of those bases supports a finding that the letterhead may be prohibited entirely because it is misleading. The potential for confusion between NBTA certification and State licensure is just that: potential. The ARDC has introduced no evidence that anyone was

actually confused by Mr. Peel's letterhead or that anyone was misled into believing that NBTA certification was a prerequisite for practicing law in the field of trial advocacy. Nor did the Illinois Supreme Court find that a natural reading of Mr. Peel's letterhead would lead one to conclude that Mr. Peel claimed a right to engage in trial advocacy solely on the basis of his NBTA certification;[5] the court merely found that one reading the letterhead "could" be misled in that fashion. This Court has granted States unlimited authority to prohibit commercial speech *only* when the speech is found to be actually misleading, not when a State merely finds that speech "could" be misleading. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 641 (1985); *In the Matter of R.M.J.*, 455 U.S. at 203. Moreover, the Court has made clear that States may not prohibit commercial speech on the basis of "unsupported assertions" that the speech is misleading. *Zauderer*, 471 U.S. at 648. In the absence of any record evidence, the Illinois Supreme Court's finding that Mr. Peel's letterhead misled readers into believing that NBTA certification permitted him to engage in trial advocacy is just such an unsupported assertion.

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[5] The actual language of the letterhead would make any such a finding untenable. The letterhead stated that Mr. Peel was licensed by the States of Illinois, Missouri, and Arizona, thereby conveying to readers the correct impression that authorization to practice law is handled at the state-government level. Consequently, the use of the word "National" in the name of "National Board of Trial Advocacy" puts readers on notice that the NBTA operates independently of official state-government attorney licensing organizations.

The other basis for the Illinois Supreme Court's "misleading" finding was its assertion that the letterhead "tacitly attests to the qualifications of the respondent as a civil trial advocate." 534 N.E.2d at 984. The Illinois Supreme Court is correct that Mr. Peel's claim regarding NBTA certification is a claim as to the quality of his legal services. But there is no evidence that Mr. Peel's claim is untruthful or misleading. The ARDC has introduced no evidence that Mr. Peel is not the experienced trial advocate attested to by his NBTA certification. The ARDC appears to be trying to preserve the fiction that all attorneys licensed by the State of Illinois are of equal competence and experience. But as the Supreme Court of Alabama noted in upholding the constitutional right of a lawyer to advertise his NBTA certification, "It would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge, and skills with regard to any given of legal practice." *Ex Parte Howell*, 487 So.2d 848, 851 (Ala. 1986).[6]

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[6] Alabama and Minnesota are the only States other than Illinois whose highest courts have ruled on whether the First Amendment entitles an attorney to advertise his NBTA certification; both courts held that attorneys were so entitled. *Ex Parte Howell*; *Johnson v. Director of Professional Responsibility*, 341 N.W.2d 282 (Minn. 1983). Ironically, in both *Howell* and *Johnson*, the attorneys (unlike Mr. Peel) had included the fact of their NBTA certifications in paid advertisements directed to potential clients. The Illinois Supreme Court declined to follow *Howell* and *Johnson*, despite the fact that Mr. Peel's "advertisement" consisted of mentioning his NBTA certification in letterhead that was never sent to potential clients.

This Court has recognized that States may regulate claims by attorneys regarding the quality of their legal practice because such claims have the *potential* for being misleading. *In the Matter of R.M.J.*, 455 U.S. at 203; *Zauderer*, 471 U.S. at 640 n.9. But the Court has never permitted a State to label such claims "misleading" and thereby prohibit all such claims without having to justify its conduct under the standards set forth in *Central Hudson*.

In summary, there is no support for the Illinois Supreme Court's finding that Mr. Peel's letterhead was "misleading" and therefore subject to outright prohibition. Accordingly, if the ARDC seeks to restrict the contents of Mr. Peel's letterhead, it must justify its conduct under the standards set forth in *Central Hudson*. As set forth below, those standards indicate that the State of Illinois violated Mr. Peel's constitutional rights in disciplining him under the facts of this case.

B. Respondent Has Failed To Show a Substantial Interest in Regulating the Content of Petitioner's Letterhead.

A State may not restrict commercial speech that is not misleading and does not propose an illegal transaction unless it first demonstrates a "substantial" interest to be achieved by its restriction. *Central Hudson*, 447 U.S. at 566. The ARDC has not and could not demonstrate a substantial interest in restricting the content of Mr. Peel's letterhead. Accordingly, its censure of Mr. Peel based on the contents of his letterhead violates his First and Fourteenth Amendment rights.

The ARDC unquestionably has a substantial interest in ensuring that representations made by attorneys to *potential clients* regarding the quality of the attorneys' legal services are substantially correct. The ARDC may legitimately be concerned that potential clients not be misled by inaccurate claims as to quality or as to the results likely to be achieved by the attorney. *See In the Matter of R.M.J.*, 455 U.S. at 203; *Zauderer*, 471 U.S. at 640 n.9. But a State's interest in regulating the content of attorney letterhead not sent to potential clients is *de minimus*. Fellow attorneys -- who are familiar with attorney licensing procedures and know which qualifications are important -- are very unlikely to be deceived by any potential misrepresentations contained in the letterhead. Existing clients by definition have already made the decision to be represented by the attorney and thus are unlikely to be affected by any potentially misleading information contained in the letterhead. Moreover, fellow attorneys and existing clients will receive enough information about the attorney from sources other than the letterhead (*e.g.*, the body of the letter attached to the letterhead) that potentially misleading information in the letterhead is unlikely to have a significant effect on those groups.

A finding that the ARDC's interest in regulating the content of attorney letterhead not sent to potential clients is *substantial* would virtually write out the "substantial interest" requirement from the requirements set forth by *Central Hudson*. Whatever interest the ARDC may have in regulating the content of attorney letterhead not sent to potential clients is sufficiently small that it cannot justify the ARDC's actions in abridging Mr. Peel's right to compose his attorney letterhead as he sees fit.

C. Respondent's Restriction on Mr. Peel's Letterhead Is Not Designed Carefully to Achieve its Goal of Preventing Deception.

Even if the ARDC could show that it had a "substantial interest" in regulating the content of Mr. Peel's letterhead, it may not do so constitutionally unless the regulation is "designed carefully" to achieve the State's substantial interest. *Central Hudson*, 447 U.S. at 564. The "designed carefully" test consists of two requirements: the regulation must "directly advance[]" the asserted government interest, and it must not be more extensive than necessary to serve that interest. *Id.*

The ARDC meets neither of those requirements. First, a ban on all claims as to quality in attorney letterhead does not "directly advance" Illinois' asserted interests in preventing consumers from being misled as to the quality of lawyers in the State and in thereby preventing them from making poor choices when retaining attorneys. For one thing, Mr. Peel's letterhead is never sent to potential clients. Moreover, the result of the ARDC's ban is to deprive consumers of *all* information regarding the quality of licensed lawyers in Illinois; therefore, consumers are no more able to choose competent attorneys than if they based their choice on misleading information in letterheads. This Court has repeatedly recognized the value to consumers of the free flow of commercial information and has held that the First Amendment protects that free flow against States' claims that the public is better off being deprived of information. *Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916, 1922 (1988); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977) ("we view as dubious any justification that is based on the benefits of public ignorance"); *Virginia State Board of*

Pharmacy, 425 U.S. at 769-70 ("[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us").[7]

Second, a total ban on all claims as to quality in attorney letterhead is more extensive than is necessary to serve the ARDC's interests. *See Board of Trustees of State University of New York*, 109 S.Ct. at 3035 (restriction on commercial speech must be "narrowly tailored" to achieve the State's interest). In banning all representations by attorneys as to the quality of their work, the Illinois Supreme Court has elected to ignore the experiences of other States which have chosen to protect consumers against potentially misleading claims as to attorney quality in far less restrictive ways. For example, in *Ex Parte Howell*, 487 So.2d at 851, the

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[7] In *Virginia State Board of Pharmacy*, the Court endorsed advertising by professionals regarding the quality of their work. In responding to arguments that permitting price advertising by pharmacists would demean the profession by permitting low-cost, low-quality businesses to drive the "professional" pharmacist out of business, the Court said, "If [the channels of communication] are truly open, nothing prevents the 'professional' pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer." *Id.* at 770. While the ARDC may have some interest in regulating attorney advertising relating to quality, the ARDC's total ban on such advertising deprives consumers of important information and prevents high-quality attorneys from competing effectively with less qualified attorneys who advertise their services on the basis of price.

Alabama Supreme Court directed the Alabam.. Bar Association to:

> [F]ormulate a proposed rule and a method for approving certifying organizations such as the NBTA before allowing the certifications to be advertised. Such a procedure, in combination with the existing requirement of review by the Bar Association of all legal advertisements ..., will reduce the possibility of spurious certifying organizations being used to mislead the public.

See also Johnson v. Director of Professional Responsibility, 341 N.W.2d at 285 (Minnesota Supreme Court vacates disciplinary action against attorney who advertised his NBTA affiliation, in the absence of "rules describing what specialty designations will be accepted and how to get that designation").

This Court repeatedly has struck down State blanket prohibitions on commercial speech by lawyers where less sweeping regulations would have fully protected the interests sought to be preserved by the State. *See Shapero v. Kentucky Bar Association*, 108 S.Ct. at 1923 ("merely because targeted, direct-mail solicitation presents lawyers with opportunity for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech"); *Zauderer*, 471 U.S. at 644, 646-47, 649 (striking down ban on accepting employment derived from unsolicited legal advice and ban on illustrations in advertisements; "State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving

commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes"); *In the Matter of R.M.J.*, 455 U.S. at 206 (striking down absolute ban on sending cards announcing opening of office to potential clients; ban is too restrictive because "[t]here is no indication of a failed effort to proceed along a less restrictive path").

The ARDC has not attempted to regulate attorney advertising regarding quality by less restrictive means. To the contrary, the Illinois Supreme Court has turned First Amendment law on its head by holding that it could ban all claims of specialization by attorneys *precisely because* Illinois has no procedure in place for certifying legal specialties. 534 N.E.2d at 986 ("[t]his State has not provided any procedure for formal recognition of specialists in the practice of law. Therefore, the use of the information on [Mr. Peel's] letterhead stating that he is certified as a trial specialist by the National Board of Trial Advocacy is misleading"). The Illinois Supreme Court's recognition that adoption of procedures for certifying attorney specialties is a feasible method of addressing its concerns (regarding potentially misleading attorney advertising relating to quality) is a recognition that its concerns can be addressed by a means far less restrictive than total prohibition. In light of Illinois' failure to make any effort to more narrowly tailor its regulation to address its legitimate concerns regarding misleading advertising, its outright prohibition of all attorney advertising relating to quality and its censure of Mr. Peel for allegedly violating that ban cannot stand. *In the Matter of R.M.J.*, 455 U.S. at 206.

D. Due Process Prohibits Respondent from Disciplining Petitioner Based on Failure to Include Disclaimer.

While the precise rationale for the Illinois Supreme Court's decision to censure Mr. Peel is not altogether clear, the rationale may have been in part that Mr. Peel violated Rule 2-105(a)(3) by failing to include in his letterhead a disclaimer of State sponsorship of the NBTA certification. *See* 534 N.E.2d at 984.

Illinois may well be within its rights in imposing such a disclaimer requirement on attorneys holding themselves out as NBTA-certified. *See Zauderer*, 471 U.S. at 654 n.15. However, due process requires that Mr. Peel not be disciplined for failure to include in his letterhead a disclaimer of State sponsorship without being given advance warning of the disclaimer requirement. *Id.* Accordingly, any attempts by the Illinois Supreme Court to censure Mr. Peel in this proceeding based on failure to disclaim State sponsorship of the NBTA certification is a violation of Mr. Peel's due process rights under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Illinois Supreme Court on the grounds that the discipline imposed upon Petitioner violated his rights to free speech guaranteed by the First and Fourteenth Amendments.

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